**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 20**

**EQUINOX HOLDINGS, INC.**

**Employer**

**And** **Case 20-RC-153017**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87**

**Petitioner**

## DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulated Election Agreement, an election was conducted on June 19, 2015 in the following appropriate voting unit:

> All full-time and regular part-time maintenance associates, maintenance MODs, and building ops associates (mechanics) employed by the Employer at its facilities located at 747 Market Street, 301 Pine Street, and 2055 Union Street, San Francisco, California; excluding all other employees, managers, guards, and supervisors as defined in the Act.

The *Tally of Ballots* showed that 41 ballots were cast for the Petitioner and 33 ballots were cast against representation, with one non-determinative challenged ballot. The Petitioner thus received a majority of the valid votes cast.

Pursuant to Board Rule 102.69(c), the Employer filed timely Objections to Conduct of the Election. Following three consecutive days of hearing, on September 18, 2015, the hearing officer issued his Report on Objections, in which he recommended overruling the Objections in their entirety. The Employer filed timely exceptions to the hearing officer's recommendations. The Petitioner filed a reply brief to the Employer's exceptions.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I have duly considered the evidence and the arguments presented by the parties and, as summarized below, I agree with the hearing officer that

all of the Employer's objections should be overruled. Accordingly, I am issuing a Certification of Representative.

## I. THE OBJECTIONS

As set forth in the Hearing Officer's Report, the hearing officer considered the Employer's Objections 1 through 5. These objections allege:

1. During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by telling voting unit employees that they would call INS and they would lose their job if they did not vote "Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

2. During the critical period preceding the Election and/or during the Election, the Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed, coerced and extorted voting unit employees by having an employee show voting unit employees a firearm, telling voting unit employees the firearm was for anyone who "fucked with him", and telling employees he would report allegations of employee theft and misconduct to the Employer if they did not vote "Yes" or for the Union in the Election. Following the above conduct, the same employee served as the Union's election observer in order to intimidate and coerce employees into voting "Yes" or for the Union in the Election. Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

3. The Union, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, threatened, intimidated, harassed and coerced voting unit employees by having its observers use cell phones in the voting room, engage in electioneering, make comments to and in the presence of voting unit employees during the election regarding how they should or would vote, and engage in and/or create the impression of surveillance of voters (and potential voters). Such conduct had a coercive impact on eligible voters, destroyed the laboratory conditions required in Board elections and improperly affected the results of the election.

4. The Board, through its Agent(s) overseeing the election, interfered with the election and/or failed to provide the minimum laboratory conditions necessary for a free

and fair election by allowing the Union's observers to use cell phones in the voting room, engage in electioneering, make comments to and in the presence of voting unit employees during the election regarding how they should or would vote, and engage in and/or create the impression of surveillance of voters (and potential voters).

5. By the conduct described above and other conduct, the Petitioner, through its officers, employees, agents, authorized representatives and others acting on its behalf and/or with its apparent authority, actual or implied endorsement or ratification, has interfered with and coerced eligible voters with regard to the exercise of their section 7 rights under the National Labor Relations Act and destroyed the atmosphere necessary to conduct a fair election through the Board's standards. Alternatively, the above conduct by employees who supported the Union destroyed the atmosphere necessary to conduct a fair election under the third party standard. The above coercive acts and other conduct taking place during the critical pre-election and actual voting period were sufficient to unlawfully affect the results of the election.

## II. THE HEARING OFFICER'S FINDINGS and THE EMPLOYER'S EXCEPTIONS:

The hearing officer concluded that the Employer failed to sustain its burden to prove that the Petitioner[1] and/or third parties engaged in any objectionable conduct that would warrant setting aside the election, and recommended that the Objections be overruled in their entirety. I agree.[2]

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). Although that standard was adopted in the context of direct Board review of a hearing officer's findings, I believe that it applies with equal force to my review, under Rule 102.69(c), which became effective April 14, 2015, and is applicable to this case. Based upon my review, the Employer has established no basis for reversing the hearing officer's findings.

[1] I shall use Union and Petitioner interchangeably when referring to Service Employees International Union, Local 87.

[2] I adopt the Hearing Officer's Report and Recommendations, for the reasons he cites, for those Objections and issues not specifically discussed in this Decision.

The Employer's exceptions to the Hearing Officer's Report are based in large part on his finding that only one of the employees who campaigned for the Petitioner (Ms. Rodriguez) was acting as its agent as defined by Section 2(13) of the Act. That finding correctly led him to analyze the alleged conduct of employees other than Rodriguez under the Board's nonparty (or third-party) standard and, based thereon, to find that none of it warrants setting aside the election. To the extent that Rodriguez was acting as an agent of Petitioner while on its payroll, I do not rely on the hearing officer's conclusion that the alleged threat attributed to her in Objection 1 became moot upon Petitioner's victory. Rather, because the hearing officer reasonably discredited witness Garay's testimony on this point, the evidence does not support that allegation.[3]

Additionally, with respect to Objections 2 and 5, the Employer excepts to the hearing officer's decision not to seek enforcement of the Employer's subpoena *ad testificandum* of one unnamed witness or to postpone the hearing to allow the Employer itself to seek enforcement of its subpoena. The Employer asserts that an unnamed employee witness would testify that, during the critical period, employee Quarles threatened to report that employee's misconduct to the Employer if he did not vote for the Union. The Employer further contends that that witness was one of three employees who observed Quarles's brandishing of an "airsoft gun[4]" and Quarles's proclamation that he possessed it in case "any fuckers want to get crazy." The Employer did not subpoena the unnamed employee witness until the second or third day of hearing, and

[3] As discussed above, I see no basis for reversing his finding. The Employer contends that the hearing officer improperly discredited witness Garay by, among other things, failing to consider whether Garay understood the questions translated to him in Spanish. The Employer's contention is based primarily on Garay's stated inability to understand one question during the hearing and the interpreter's requests to have questions repeated on a few occasions. However, neither of those events is uncommon at hearing, and the record does not demonstrate that the witness did not understand the questions ultimately posed to him. Once those questions were repeated and/or clarified, Garay responded without any apparent, or further professed, difficulty in understanding.

[4] Although not elaborated upon in the hearing officer's decision, I take notice that "airsoft" guns are "replica firearms, or a special type of air guns used in airsoft [a combat-type game], that fire spherical projectiles of many different materials, including (but not limited to) plastic, aluminum, and biodegradable material." https://en.wikipedia.org/wiki/Airsoft_gun. They are designed to be non-lethal and to imitate the appearance of a firearm. The hearsay testimony, which the hearing officer admitted despite objection and which I shall accept at face value for the purposes of this Decision, establishes that one of the three unnamed employees seemingly mistook Quarles's imitation gun for an actual firearm.

did so only after the hearing officer correctly pointed out that the Employer's proffered testimony regarding the incident was hearsay and of little probative value.

I further agree with the hearing officer's decision, in connection with Objections 2 and 5, not to delay the hearing in order to seek, or permit the Employer to seek, enforcement of the subpoena. Even assuming that Quarles threatened in one instance to report the unnamed employee's misconduct to the Employer, that threat was directed to, and involved, only the unnamed employee—an insufficient number to affect the election results. As the hearing officer found, Quarles's separate alleged brandishing of an imitation gun and his ambiguous proclamation cannot reasonably be linked to the election, particularly as far as the other two unnamed employee witnesses are concerned.[5] The two events are wholly unrelated. It follows that this conduct would not have the tendency to interfere with employee free choice in the election. Accordingly, notwithstanding the Employer's contentions, adjourning the hearing for the time necessary to obtain enforcement of the subpoena, and possibly further proceedings to compel the anonymous witness's testimony, would not necessarily have resolved any relevant issue.[6] In sum, any error in failing to seek enforcement of the subpoena was at most harmless.

Turning to Quarles's service as the Petitioner's observer (Objection 5), I agree with the hearing officer that it was not objectionable. While a handful of employees observed police officers handcuff Quarles and escort him to a private office four days before the election, those same employees and/or others also observed Quarles subsequently exit the Employer's facility accompanied by the police, uncuffed and

[5] The Employer did not subpoena those employee witnesses, although it appears from Area Maintenance Manager Fernandez's testimony that he knew the witnesses' identities. Nevertheless, as noted, I accept the finding that Quarles brandished an imitation gun.

[6] I also find it unnecessary to reopen the record, and I accordingly deny the Employer's request to reopen it. Among other purposes, the Employer requests to reopen the record in order to belatedly subpoena and examine employee Eneliko about his observation and potential list keeping of voters (while not serving as the Petitioner's observer) at an unknown distance from the polls. In the absence of any evidence whatsoever that employees were aware of Eneliko's conduct, whatever it was, it is not objectionable. See *Chrill Care, Inc.*, 340 NLRB 1016, 1016 (2003) ("the Board generally does not find . . . list making coercive in the absence of evidence that employees knew their names were being recorded").

otherwise unrestrained. Quarles's service as an election observer a mere four days later further demonstrated to employees that his "offense" was not considered serious. Moreover, there is no record evidence that any voters had any reason to believe that the Employer objected to Quarles's service as Petitioner's observer.[7] By all appearances, Quarles belonged and was welcome there. Finally, the record establishes that Petitioner did not even learn of the Employer's eleventh-hour termination of Quarles until the morning of the election. In these circumstances, when notice was short, the election was imminent, and when the asserted "offense" fell far short of its initial appearance, it was not unreasonable or objectionable for the Petitioner to utilize Quarles as its observer. See, generally, *Embassy Suites Hotel, Inc*., 313 NLRB 302 (1993); citing *San Francisco Bakery Employers Assn.*, 121 NLRB 1204, 1206 (1958); and *Kelley & Hueber*, 309 NLRB 578 (1992).

Finally, with respect to the Union's "rally" on the morning of the election (Objection 3), I agree with the hearing officer's finding that it did not contravene the Board's *Peerless Plywood* rule. It also bears noting that neither would the rally reasonably convey to employees that the Employer was "powerless to protect its own legal rights" in a confrontation with the Petitioner. Compare *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). In sum, the "rally" did not constitute objectionable conduct.

## III. CONCLUSION

While this was a close election, the margin of victory is not the predominant consideration. See e.g., *Mastec North America, d/b/a Mastec Direct TV*, 356 NLRB No. 110 (2011)(the union won by a 14 to 12 margin); *The Lamar Company, LLC d/b/a*

[7] There is no evidence that employees knew of Quarles's termination prior to the election. Union Representative Miranda testified that the Employer's attorney "challenged his participation" in the election during the pre-election conference at the Market Street polling location, but there is no evidence that this "challenge" was raised in the presence of any voters at all, much less any who voted at the Pine Street location, where Quarles served as an observer. During the Union's "rally" at the pre-election conference, the Employer's employee observers were seated against a wall at a distance approximated on the record to be 20-30 feet from where the Employer's attorney and Quarles stood. It's unclear whether they were still seated at that distance, or even in the room, when the attorney raised his challenge.

*Lamar Advertising of Janesville*, 340 NLRB 979 (2003)(the union prevailed by a 9 to 7 margin). Rather, the paramount consideration is whether the alleged objectionable conduct can reasonably be said to have affected the outcome of the election. Having carefully reviewed the entire record, the Hearing Officer's Report and recommendations, the Employer's exceptions, and the arguments made by the parties, I believe the hearing officer correctly found the answer to be in the negative. Accordingly, pursuant to Rule 102.69(c)(2), I overrule the Objections in their entirety, and I shall certify the Petitioner as the exclusive collective-bargaining representative of the appropriate bargaining unit, below.

## IV. CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 87**, and that it is the exclusive representative of all the employees in the following bargaining unit:

> All full-time and regular part-time maintenance associates, maintenance MODs, and building ops associates (mechanics) employed by the Employer at its facilities located at 747 Market Street, 301 Pine Street, and 2055 Union Street, San Francisco, California; excluding all other employees, managers, guards, and supervisors as defined in the Act

## V. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **November 24, 2015**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at San Francisco, California this 10th day of November, 2015.

/S/

Joseph F. Frankl, Regional Director
National Labor Relations Board,
Region 20
901 Market Street, Suite 400
San Francisco, California 94103